



September 19, 2001

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2001-4198

Dear Mr. Ramirez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152166.

The Lower Colorado River Authority (the "LCRA") received a request for "bid responses and awards for RFQ#:1659 (Re-bid #2)." You state that the submitted information may be excepted from disclosure under sections 552.101, 552.110, 552.113, or 552.131 of the Government Code. You make no arguments in support of these exceptions, but you inform us that the LCRA has forwarded the request to FLIR Systems, Inc. ("FLIR") and Leake Co. ("Leake"), the third parties whose proprietary interests may be implicated by the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). You state that Leake has notified the LCRA that it does not object to the release of its bid.¹ FLIR timely responded to your notice, and contends that its proposal is excepted from required public disclosure pursuant to section 552.110 of the Government Code. We have considered the asserted exception and reviewed the submitted information.

Section 552.110 protects the property interests of private persons and entities by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial

¹We therefore assume that the LCRA has released information that is responsive to this aspect of the request. If not, then you must do so immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000).

information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. FLIR argues that the information contained in the bid "contains multiple FLIR trade secrets," the disclosure of which will eliminate a "competitive advantage."

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

FLIR claims that its bid contains proprietary information constituting trade secrets, including unpublished information on particular products, FLIR's pricing formula, and equipment specifications which are the basis of certain assumptions made by competitors. We first note that information relating to pricing is not ordinarily excepted from public disclosure as a trade secret. Open Records Decision Nos. 319 (1982); 306 (1982); 175 (1977). Pricing proposals may be withheld only during the bid submission process. Open Records Decision Nos. 306 (1982); 184 (1978). Thus, the LCRA may not withhold FLIR's pricing formula under section 552.110(a). After reviewing the remaining information at issue and the arguments set forth by FLIR under section 552.110 for trade secret protection, we conclude that FLIR has not established that the information at issue constitutes trade secrets for purposes of section 552.110 of the Government Code. Therefore, the information at issue may not be withheld under section 552.110(a).

The governmental body, or interested third party, raising section 552.110(b) must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also* Open Records Decision No. 661 at 5-6 (1999); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). After reviewing the information at issue and the arguments set forth by FLIR, we conclude that FLIR has not demonstrated that substantial competitive injury would result from disclosure of the submitted information. Therefore, the information at issue may not be withheld under section 552.110(b).

In summary, all of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;


2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 152166

Enc. Submitted documents

c: Mr. Gary E. Strathan
Texas Infrared
5450 Sunbury Drive
Beaumont, Texas 77707
(w/o enclosures)

Mr. John F. Keane
Flir Systems, Inc.
16 Esquire Road
North Billerica, Massachusetts 01862
(w/o enclosures)

Leake Company
10920 Switzer Avenue #101
Dallas, Texas 75238
(w/o enclosures)